A

IN RE FAR ORIGIN SDN BHD

HIGH COURT MALAYA, IPOH
MOSES SUSAYAN JC
[POST-WINDING-UP SUIT NO: AA-28PW-40-03-2024
& COMPANY WINDING-UP PETITION NO: AA-28NCC-41-11-2017]
B 12 MARCH 2025

Abstract – *(i) The requirement to obtain leave before commencing proceedings against a liquidator is a fundamental safeguard in corporate insolvency law; (ii) An application seeking leave to pursue legal action against a liquidator ought to be dismissed if it is shown that the liquidator's conduct in the management of the company is consistent with statutory requirements. A liquidator cannot be subjected to unwarranted litigation unless clear evidence of misconduct or pecuniary loss is demonstrated. Permitting unfounded lawsuits against liquidators can lead to delays in winding-up proceedings and increased costs, ultimately prejudicing creditors and contributories.*

COMPANY LAW: *Liquidators – Leave to initiate proceedings – Application to initiate proceedings against liquidator for allegations of impropriety and mismanagement – Whether there was evidence of bad faith, misconduct or pecuniary loss to company – Res judicata – Whether applicable – Locus standi – Whether established – Whether liquidator's conduct in management of company consistent with statutory requirements – Whether obtaining leave before initiating proceedings against liquidator required – Whether applicant met necessary criteria for leave to commence proceedings against liquidator*

The applicant sought leave to initiate proceedings against the liquidator of Far Origin Sdn Bhd ('FOSB') for allegations of impropriety and mismanagement. The applicant complained that one of the contributories in FOSB improperly increased his shareholding in FOSB to 315,000 shares and later transferred 11,000 shares to his wife without making any payment. The applicant argued that this act was illegal and void, resulting in pecuniary losses to him. He contended that the shares were unlawfully issued and transferred without consideration, and the liquidator's confirmation stating that no records of payment for these shares existed supported his claim. Based on this, the applicant asserted that the share transfers should be rectified and declared invalid. The applicant also argued that FOSB held 26 shop lots as a bare trustee under an irrevocable power of attorney ('PA') on behalf of Arena Ria Sdn Bhd ('ARSB'), a company where the applicant held a 40% share. The applicant claimed that the assets belonged to ARSB, and their distribution to FOSB's shareholders would constitute criminal misappropriation. Further, the applicant demanded the formation of a Committee of Inspection ('COI') to investigate the alleged share

improprieties and asset misappropriation, citing the liquidator's refusal as a failure of fiduciary duty. The applicant also sought directorship in Puspa Sepakat Sdn Bhd, where FOSB was a substantial shareholder, alleging inaction from the liquidator on the matter. Based on these claims, the applicant asserted a *prima facie* case was established, invoking the court's power to intervene under s. 206(3) of the Companies Act 2016 ('CA'). The applicant prayed for leave to commence proceedings to protect his contributory rights and prevent further losses to the company (FOSB). The respondent opposed the applicant's request for leave to commence proceedings against the liquidator of FOSB. The respondent submitted that the applicant's application lacked merit and was an attempt to relitigate resolved issues. The respondent contended that the liquidator had acted in accordance with his statutory duties, and the applicant had not provided sufficient evidence to warrant the court's intervention. The question for determination for this court was whether leave could be granted for the applicant to pursue legal action against the liquidator.

Held (dismissing application):

(1) The legal threshold for leave to sue a liquidator is high. It is designed to prevent vexatious claims while ensuring legitimate grievances are addressed. Courts will only grant leave in exceptional circumstances where clear misconduct or financial harm to the company is proven. (para 23)

(2) The applicant's claims regarding the alleged improprieties of the shareholding in FOSB were untenable. The Court of Appeal had already adjudicated on this issue during the winding-up proceedings and had ruled that the applicant had no basis to claim unfair dilution of shares as he was offered the right to subscribe additional shares in proportion to his existing holdings but declined to do so. The applicant's failure to appeal this ruling to the Federal Court rendered the matter conclusively settled under the doctrine of *res judicata*. Accordingly, the applicant was estopped from raising the alleged shareholding irregularities again in a separate proceeding. The applicant had failed to establish a *prima facie* case or demonstrate any pecuniary loss. There were no grounds to grant leave for the applicant to commence an action against the liquidator. (paras 26-32)

(3) A PA could not be deemed irrevocable if valuable consideration is not proven. Here, the applicant had failed to provide substantive evidence of such consideration beyond a mere recital in the document. A PA also ceases to have legal effect upon the winding-up of both the donor and the attorney. Since both FOSB and ARSB were under liquidation, any rights purportedly granted by the PA had become legally ineffective. A PA is merely an instrument delegating authority and did not in itself transfer ownership. (paras 34-36)

(4) Given that ARSB was under liquidation, its liquidator was the only legally authorised party to assert ownership claims over its assets. The liquidator of ARSB failed to provide an affidavit clarifying the company's claim over the shoplots. As a contributory shareholder of ARSB, the applicant lacked *locus standi* to assert ownership on behalf of ARSB. If ARSB indeed had a valid ownership claim, it was the responsibility of its liquidator and not the applicant to take legal action. Since the liquidator of ARSB had not asserted any ownership rights over the properties, the applicant's attempt to independently pursue the claim was legally untenable. The lack of a formal claim from the ARSB liquidator further weakened the applicant's position. The applicant failed to meet the necessary criteria for leave to commence proceedings against the liquidator of FOSB. The application therefore stood dismissed. (paras 39-42)

(5) The applicant had not demonstrated the necessity of forming a COI in FOSB's liquidation. A COI is not an automatic right but a discretionary measure to be summoned upon the request of a contributory or creditor. Such a request was made, and a vote was held among the creditors and contributories of FOSB. However, the majority of creditors and contributories opposed its formation. In accordance with r. 119 of the Companies (Winding-Up) Rules 1972, a resolution was deemed passed when a majority in both number and value voted in favour of the decision. The decision against the formation of a COI was validly made and was binding. The applicant had provided no evidence to challenge the validity of the voting process or to demonstrate that the rejection of the COI was unreasonable. The applicant had not established a valid basis for leave to commence proceedings against the liquidator of FOSB. (paras 43-49)

(6) The applicant failed to establish any legal or factual basis to compel the liquidator of FOSB to remove a director of PSSB and appoint the applicant in their place. Section 206(3) of the CA, which the applicant relied on, merely prescribes the procedural requirement of issuing a special notice and passing a resolution for the removal or appointment of a director. It did not, in any way, grant the liquidator unilateral authority to effect such changes in PSSB's board of directors. The applicant had not provided any justification for why his appointment to PSSB was necessary to safeguard FOSB from pecuniary losses, an essential criterion for obtaining leave to initiate legal proceedings against the liquidator. In the absence of any legal duty on the liquidator to act in the manner sought and given the lack of evidence of financial harm to FOSB, there was no merit in the applicant's request. (paras 50-52)

(7) The requirement of obtaining leave before initiating proceedings against a liquidator is a long established principle, and courts must apply it accordingly. Herein, the liquidator's conduct in the management of the company had been consistent with statutory requirements. The applicant had failed to provide credible evidence of bad faith, misconduct or pecuniary loss to the company. Accordingly, the applicant's application was dismissed. This judgment, thus, reinforced the importance of protecting the integrity of the liquidation process and ensuring that liquidators can discharge their duties without undue interference. (paras 56 & 57)

Case(s) referred to:

AA Sawit Sdn Bhd v. Stable-Win Sdn Bhd [2014] CLJU 667; [2014] 1 LNS 667 HC ***(refd)***
Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 10 CLJ 7 HC ***(refd)***
Affluent Freight Sdn Bhd v. Sumathi K Appukuttan Pillai & Anor [2001] 8 CLJ 71 HC ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Chan Thiam Teng v. Ban Swee Heng Sdn Bhd [1992] CLJU 37; [1992] 1 LNS 37 HC ***(refd)***
Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA ***(refd)***
Firstcrest Global Ltd & Ors v. Indexia Assets Ltd & Ors And Another Appeal [2006] 3 CLJ 860 CA ***(refd)***
Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd [2018] 2 CLJ 401 CA ***(refd)***
Lawlor v. Gray [1984] 3 All ER 345 ***(refd)***
Lim Boon Chuan v. Wonderful Castle Sdn Bhd (In liquidation) & Anor [2019] 1 CLJ 65 CA ***(refd)***
N Chanthiran Nagappan v. Kao Che Jen [2023] 7 CLJ 677 FC ***(refd)***
Ngadi Apandi v. Mohamad Ali Md Ahsan & Ors [2016] CLJU 1743; [2016] 1 LNS 1743 HC ***(refd)***
OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***
Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***
Sarawak Timber Industry Development Corp v. Borneo Pulp Plantation Sdn Bhd [2004] 8 CLJ 584 HC ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [2009] CLJU 1030; [2009] 1 LNS 1030 HC ***(refd)***
Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation) [2020] 4 CLJ 841 FC ***(refd)***

Legislation referred to:

Companies (Winding-Up) Rules 1972, r. 119
Companies Act 1965, s. 236(3)
Companies Act 2016, ss. 206(3), 486(2)
Courts of Judicature Act 1964, s. 25(2), Schedule, para. 11

For the applicant - Domnic Selvam Gnanapragasam; M/s Domnic Pragasam Tan & Co
For the liquidator/respondent - Lee Boon Koon; M/s Arissa Tan Chien & Co

Reported by Suhainah Wahiduddin

A

JUDGMENT

Moses Susayan JC:

Introduction

[1] The applicant ("Dato' Suki Mee") seeks leave to initiate proceedings against the liquidator of Far Origin Sdn Bhd ("FOSB"), for allegations of impropriety and mismanagement. In this respect, the applicant demands court intervention. However, the liquidator opposes the applicant's request for leave to commence proceedings against the liquidator, arguing that the applicant has failed to meet the legal threshold for such an application. The question for determination for this court is whether leave can be granted for the applicant to pursue legal action against the liquidator.

Background Facts

[2] The applicant alleges impropriety and mismanagement. The applicant complains that one of the contributories in FOSB, known as Toi Sin Fatt improperly increased his shareholding in FOSB to 315,000 shares and later transferred 11,000 shares to his wife, Ng Yok Fong, without making any payment. The applicant argues that this act was illegal and void, resulting in pecuniary losses to him. He contends that the shares were unlawfully issued and transferred without consideration, and the liquidator's confirmation on 28 February 2024 stating that no records of payment for these shares exist supports his claim. Based on this, the applicant asserts that the share transfers should be rectified and declared invalid.

[3] The applicant also argues that FOSB holds 26 shop lots as a bare trustee under an irrevocable power of attorney ("PA") on behalf of Arena Ria Sdn Bhd ("ARSB"), a company where the applicant holds a 40% share. The applicant claims that the assets belong to ARSB, and their distribution to FOSB's shareholders would constitute criminal misappropriation.

[4] Further, the applicant demands the formation of a Committee of Inspection ("COI") to investigate the alleged share improprieties and asset misappropriation, citing the liquidator's refusal as a failure of fiduciary duty. The applicant also seeks directorship in Puspa Sepakat Sdn Bhd, where FOSB is a substantial shareholder, alleging inaction from the liquidator on the matter. Based on these claims, the applicant asserts a *prima facie* case is established, invoking the court's power to intervene under s. 206(3) of the Companies Act 2016. The applicant prays for leave to commence proceedings to protect his contributory rights and prevent further losses to the company (FOSB).

B C D E F G H I

Respondent's Submission

[5] The respondent opposes the applicant's request for leave to commence proceedings against the liquidator of FOSB on several grounds. Firstly, the respondent asserts that the applicant has failed to establish a *prima facie* case or demonstrate pecuniary loss to FOSB, as required under *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; [2012] 1 MLRA 687; [2012] 2 MLJ 713. The allegations of impropriety in shareholding, specifically the issuance and transfer of 315,000 shares, were adjudicated during the winding-up proceedings, and the Court of Appeal found no basis for the applicant's claims. Therefore, the respondent submits that the doctrine of *res judicata* bars this matter and cannot be revisited.

[6] Secondly, the respondent contends that the formation of COI is unwarranted. Most creditors and contributories opposed the COI's formation, deeming it unnecessary given FOSB's solvency and the limited number of stakeholders. The respondent also submits that a COI would add unnecessary delays and costs to the liquidation process. Furthermore, the liquidator has already addressed the alleged share improprieties and provided relevant records, rendering a COI redundant.

[7] Regarding the applicant's claim that 26 shop lots belong to ARSB under a PA, the respondent argues that the PA does not confer ownership of these assets to ARSB. The liquidator of ARSB confirmed that the assets belong to FOSB, and the respondent asserts that transferring them would result in losses to FOSB. The applicant's claims are, therefore, unfounded and procedurally improper.

[8] In challenging the applicant's request to be appointed director in Puspa Sepakat Sdn Bhd ("PSSB"), the respondent states that FOSB, as a minority shareholder in PSSB, has no authority to appoint directors, and the applicant has not demonstrated how such an appointment would benefit FOSB.

[9] The respondent submits that the applicant's application lacks merit and is an attempt to relitigate resolved issues. The respondent contends that the liquidator has acted in accordance with his statutory duties, and the applicant has not provided sufficient evidence to warrant the court's intervention.

[10] Upon reviewing the submissions by both parties, this court finds in favour of the respondent and its liquidator. The applicant, has failed to meet the threshold requirement for obtaining leave to commence proceedings against the liquidator, as established in *Ooi Woon Chee* (*supra*).

A **Law On Leave To Commence Action On The Liquidator**

[11] The law governing the requirement of leave to commence action against a liquidator has been firmly established in a number of cases through the years by the Malaysian courts. The recent decision of the Federal Court in *N Chanthiran Nagappan v. Kao Che Jen* [2023] 7 CLJ 677; [2023] 5 MLJ
B 284; [2023] 6 AMR 73; [2023] 5 MLRA 247 reaffirmed this position that leave of court is a necessary prerequisite for any legal proceedings against a court-appointed liquidator. The rationale for this requirement is twofold:

(i) to protect liquidators, who are officers of the court, from vexatious or
C frivolous litigation; and

(ii) to ensure an orderly and efficient winding-up process without unnecessary legal disruptions.

[12] The test for granting leave was established in *Ooi Woon Chee* (*supra*), which requires that the applicant:
D

(i) demonstrates a *prima facie* case; and

(ii) establishes pecuniary loss to the wound-up company.

The *prima facie* requirement serves as a filter to prevent baseless claims, as
E reaffirmed in *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 10 CLJ 7; [2007] 5 MLJ 685.

[13] The Federal Court in *N Chanthiran* (*supra*) reaffirmed that leave of the winding-up court is required before commencing proceedings against a court-appointed liquidator. It commented that the Court of Appeal had wrongly
F interpreted s. 486(2) of the Companies Act 2016, concluding that leave was unnecessary because the section did not explicitly mention it. However, the Federal Court ruled that the phrase "subject to the control of the court" in s. 486(2) implicitly required leave, aligning with the long-standing common law principle. The court emphasised that liquidators are officers of the court, and any claims against them must be scrutinised to prevent vexatious and
G frivolous litigation that could interfere with the winding-up process. Citing *Ooi Woon Chee & Ano*r (*supra*), the court held that the *prima facie* standard applies, meaning an applicant must show sufficient merit and potential pecuniary loss to proceed. Consequently, the appeal was allowed, affirming that leave is mandatory before suing a court-appointed liquidator. The court
H held:

> The phrase 'subject to the control of the Court' in s. 486(2) essentially meant that a liquidator was answerable to the court in the performance of his duties. Once the liquidator was sanctioned by the court to perform his duties, no party could interfere with him save with the permission of
I the winding-up court.

[14] Before granting leave, the winding-up court must be satisfied that the claim has a reasonable prospect of success. In *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11; [1995] 3 MLJ 204; [1995] 3 AMR 2630 (folld), the Court of Appeal, when interpreting s. 236(3) of the Companies Act 1965, emphasised that:

> ... it is clear that a Liquidator having been appointed by the court, is an officer of the Court. It goes without saying leave of Court is needed before an action is commenced against him and officers like him.

[15] Section 236(3) of the Companies Act 1965 is *pari materia* with s. 486(2) of the Companies Act 2016, which provides:

> 486 Powers of liquidator in winding up by Court
>
> ...
>
> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[16] In *Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation)* [2020] 4 CLJ 841; [2020] 6 MLJ 168; [2020] 2 MLRA 295, the Federal Court reiterated that courts must protect the integrity of the liquidation process by ensuring only meritorious claims proceed.

[17] Thus, Malaysian courts have consistently maintained a stringent approach in granting leave, emphasising that a liquidator cannot be subjected to unwarranted litigation unless clear evidence of misconduct or pecuniary loss is demonstrated.

[18] The requirement to obtain leave before commencing proceedings against a liquidator is a fundamental safeguard in corporate insolvency law. Liquidators, as court-appointed officers, must be able to perform their statutory duties without undue interference. The Federal Court in *Ooi Woon Chee & Anor* (*supra*) established two essential criteria for granting leave:

(i) the existence of a *prima facie* case, meaning the claim must have legal merit; and

(ii) pecuniary loss to the wound-up company, requiring proof that the company has suffered or will suffer financial harm due to the liquidator's actions.

[19] His Lordship Justice Zulkefli, CJ (Malaya) in *Ooi Woon Chee* (*supra*) states the two essential criteria in these words:

> [11] **for leave to be granted to proceed with the 505 Suit pecuniary loss must be shown**, otherwise the action would be a waste of time and costs. On this point in the case of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 1 MLRH 454 at p. 532 it

A was held that in an application for leave to commence proceedings for, *inter alia*, breach of duty against a liquidator, it is necessary to prove pecuniary loss to the company.

...

B [15] In order to succeed for the granting of leave the majority contributories must also make out a *prima facie* case, a standard to protect the court's officer and the winding up process. (See the cases of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 1 MLRH 454; *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] CLJU 320; [1995] 1 LNS 320; [1995] 5 MLRH 110 and *Sarawak* C *Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd* [2004] 8 CLJ 584; [2004] 2 MLRH 749). These cases show that in applying the test the court is compelled to evaluate the evidence led to determine whether the test is met. In *Mamone & Anor. v. Pantzer* [2001] ACSR 743, it was held that prospective litigant must, to obtain leave, demonstrate its claim has sufficient merit.

D (emphasis added)

[20] I may also add here that requirement to obtain leave applies not only to court-appointed liquidators but also in cases where liquidators are appointed in companies that have been voluntarily wound up. In *Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd* [2018] 2 CLJ 401; [2017] E MLRAU 419, the respondent was voluntarily wound up by its members, Justice Mary Lim (as Her Ladyship then was) emphasised this requirement of leave, stating:

[14] In law, a company may be wound up either by the court or voluntary by the company itself – see s. 211 of Division 1. Once a company has been F wound up by the court, or once the winding up court has appointed a provisional liquidator, s. 226(3) mandates that leave of the winding up court must be procured either before an action or proceeding is commenced or if already commenced, proceeded with.

[15] Where the company is wound up voluntarily, and that may be by special resolution of the company, or due to the expiration of the duration G of the company fixed either in its memorandum or articles of association and a general resolution has been passed to that effect (see **s. 254**) or even on grounds of insolvency and a statutory declaration to that effect has been lodged with the registrar of companies and with the official receiver (see **s. 255**), **s. 263(2)** carries a similar requirement on leave as that H found in **s. 226(3)**.

(emphasis added)

[21] To satisfy the *prima facie* case requirement, the applicant must provide substantive evidence beyond mere allegations. Courts have emphasised that this requirement acts as a filter to prevent speculative claims. In I *N Chanthiran Nagappan* (*supra*), the Federal Court held that claims must demonstrate a reasonable probability of success and not be frivolous.

Similarly, *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [2009] CLJU 1030; [2009] 1 LNS 1030; [2010] 1 MLJ 547; [2009] 8 AMR 776; [2009] 5 MLRH 462; clarified that mere dissatisfaction with a liquidator's decisions is insufficient, there must be evidence of statutory breach or misconduct.

[22] The pecuniary loss requirement ensures that leave is not granted for personal grievances but only when the company itself has suffered financial harm. In *Abric Project Management Sdn Bhd* (*supra*), the court held that leave should only be granted where clear evidence shows a negative financial impact on the company. Courts have consistently ruled that personal losses do not justify leave unless directly linked to company losses.

[23] To sum up, the legal threshold for leave to sue a liquidator is high. It is designed to prevent vexatious claims while ensuring legitimate grievances are addressed. Courts will only grant leave in exceptional circumstances where clear misconduct or financial harm to the company is proven.

[24] In light of the cause papers filed, there is no ambiguity regarding the nature of the application before this court *ie*, whether it seeks leave to commence action against the liquidator, FOSB, or both. Although enclosure 1 does not explicitly specify this, the applicant's cause papers and submissions clearly indicate that the request pertains to leave to proceed against the liquidator. Accordingly, for the purposes of this judgment, the court's focus will be solely on determining whether leave should be granted for legal proceedings against the liquidator.

[25] Having set out the legal threshold for leave, I will now examine whether the applicant met the requirements.

Issue 1: Share Impropriety And Pecuniary Losses

[26] Upon careful consideration of the submissions and evidence presented by both parties, this court finds that the applicant's claims regarding the alleged improprieties of the shareholding in FOSB are untenable. The Court of Appeal in Civil Appeal No: A-02(NCC)(A)-963-05/2019 had already adjudicated on this issue during the winding-up proceedings, the Court of Appeal ruled that the applicant had no basis to claim unfair dilution of shares as he was offered the right to subscribe additional shares in proportion to his existing holdings but declined to do so. The applicant's failure to appeal this ruling to the Federal Court renders the matter conclusively settled under the doctrine of *res judicata*.

[27] The principle of *res judicata*, as expounded in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189; [1995] 1 MLRA 611; [1995] 3 AMR 2559 dictates that once a competent court has decided a matter, the same issue cannot be relitigated. The Supreme Court, *inter alia*, stated the principle as follows:

A [23] What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicature*. *When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur*.
B The public policy of the law is that it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
C
(emphasis added)

[28] The Supreme Court in *Asia Commercial* (*supra*) went further to explain on issue of estoppel, which is applicable in the circumstance of the present case:

D [35] ... the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more *ie*, that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This
E sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision

F **[29]** Further, the difference between the doctrine of issue estoppel and cause of action estoppel was well articulated by Justice Peter Gibson in *Lawlor v. Gray* [1984] 3 All ER 345, who said:

Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of
G action.

[30] In *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534; [1997] 2 MLJ 544; [1995] 1 MLRA 611, the Court of Appeal held, *inter alia*, as follows:

H The plea of *res judicata* encompasses two distinct forms of estoppel, *ie*, 'cause of action estoppel' and 'issue estoppel' ...

'Issue estoppel' represents an extension of the doctrine of *res judicata* to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also to every point which properly belonged to the subject of litigation,
I and which the parties, exercising reasonable diligence, might have brought forward at the time.

[31] Accordingly, the applicant is estopped from raising the alleged shareholding irregularities again in a separate proceeding. A

[32] Pursuant to s. 25(2) and para. 11 of the Schedule to the Courts of Judicature Act 1964, this court can dismiss proceedings where the matter is *res judicata*. As the Court of Appeal has already ruled on the issue raised by the applicant, the matter is conclusively settled. Consequently, the applicant has failed to establish a *prima facie* case or demonstrate any pecuniary loss. Therefore, this court finds no grounds to grant leave for the applicant to commence an action against the liquidator. B

Issue 2: 26 Units Of Shop Lots Purportedly Belonging To Arena Ria Sdn Bhd C

[33] After reviewing the submissions and evidence, this court rules in favour of the respondent and its liquidator regarding the purported irrevocable power of attorney and its alleged conferral of proprietary interest in the disputed shop lots to ARSB.

[34] The applicant contends that the PA was irrevocable, granted valuable consideration, and transferred ownership rights in the 26 shop lots to ARSB. However, the respondent has demonstrated that this assertion lacks both legal and evidentiary support. The case of *Affluent Freight Sdn Bhd v. Sumathi K Appukuttan Pillai & Anor* [2001] 8 CLJ 71; [2001] MLJU 635; [2001] AMEJ 0252; [2001] 4 MLRH 29 establishes that a PA cannot be deemed irrevocable if valuable consideration is not proven. Here, the applicant has failed to provide substantive evidence of such consideration beyond a mere recital in the document. D E

[35] Furthermore, in *Tee Siew Kai* (*supra*), the Federal Court held that a PA ceases to have legal effect upon the winding up of both the donor and the attorney. Since both FOSB and ARSB are under liquidation, any rights purportedly granted by the PA have become legally ineffective. F

[36] The respondent has also successfully argued that a PA does not confer proprietary rights. In *Ngadi Apandi v. Mohamad Ali Md Ahsan & Ors* [2016] CLJU 1743; [2016] 1 LNS 1743; [2017] 3 AMR 83; [2016] MLJU 1548; [2016] MLRHU 1548, His Lordship Justice Wan Ahmad Farid Wan Salleh held that a PA is merely an instrument delegating authority and does not in itself transfer ownership. His Lordship relied on *Firstcrest Global Ltd & Ors v. Indexia Assets Ltd & Ors And Another Appeal* [2006] 3 CLJ 860; [2006] 2 MLRA 1; [2006] 5 MLJ 723; [2006] 5 AMR 304, where the Court of Appeal reaffirmed that a PA does not create a proprietary right independent of an underlying principal agreement. His Lordship said this: G H

> [19] A power of attorney, no matter how the words therein are couched, does not have a life of its own. It does not confer any proprietary right to the donee. In *Firstcrest Global Limited & Ors v. Indexia Assets And Another Appeal* [2006] 5 MLJ 723 CA, James Foong JCA (as he then was) in delivering the judgment if the Court of Appeal stated the law as follows: I

> ... But it is my view that this instrument (Power of Attorney) is only a subsidiary document to the Sale of Shares Agreement. Without the Sale of Shares Agreement, which is the principal instrument, the Power of Attorney cannot subsist. It does not have a life of its own. It is appendant to the Sale of Shares Agreement. So when the principal agreement cannot give proprietary right in law then the Power of Attorney, a subsidiary instrument, also confers no such right.

[37] Further, the liquidator of ARSB has confirmed in writing that the PA does not form part of ARSB's official records and that the disputed shop lots are not registered as ARSB's assets. This further undermines the applicant's claim that the properties should revert to ARSB for distribution.

[38] Due to conflicting ownership claims, the court had previously directed the liquidators of both FOSB and ARSB to submit affidavits clarifying the ownership of the 26 shop lots. The court noted discrepancies between ARSB's financial records, where the properties were listed as assets, and the liquidator's position that ARSB had no ownership claim. The liquidator of FOSB complied and submitted an affidavit, supported by financial records and land searches, affirming that the properties belong to FOSB. However, the liquidator of ARSB failed to submit an affidavit, further complicating the ownership determination.

[39] Given that ARSB is under liquidation, its liquidator is the only legally authorised party to assert ownership claims over its assets. Despite the court's explicit directive, the liquidator of ARSB failed to provide an affidavit clarifying the company's claim over the shop lots. As a contributory (shareholder) of ARSB, the applicant lacks *locus standi* to assert ownership on behalf of ARSB. If ARSB indeed had a valid ownership claim, it was the responsibility of its liquidator and not the applicant to take legal action.

[40] Since the liquidator of ARSB has not asserted any ownership rights over the properties, the applicant's attempt to independently pursue the claim is legally untenable. The lack of a formal claim from the ARSB liquidator further weakens the applicant's position.

[41] Based on these legal principles and factual findings, the court concludes that the PA does not confer proprietary rights to ARSB. The respondent's arguments regarding the PA's invalidity and ineffectiveness are well-supported by decided cases. Furthermore, as the liquidator of ARSB is the only proper party to assert any ownership claim over the shop lots, the applicant lacks the legal standing to bring this matter before the court.

[42] Accordingly, the court finds that the applicant has failed to meet the necessary criteria for leave to commence proceedings against the liquidator of FOSB. The application therefore stands dismissed

Issue 3: Is The Applicant Entitled To Form A COI?

[43] After reviewing issues 1 and 2, the court finds that the applicant has not demonstrated the necessity of forming a COI in FOSB's liquidation. The applicant's request for a COI to investigate alleged improprieties in FOSB's shareholding is barred by *res judicata*. Further, the claim over the 26 shop lots based on the PA lacks merit, as the PA does not confer ownership rights, the ARSB liquidator has not asserted any claim, and no legal proprietary transfer has occurred.

[44] The cases of *Affluent Freight Sdn Bhd* (*supra*) and *Tee Siew Kai* (*supra)*, firmly establish that a COI is not an automatic right but a discretionary measure to be summoned upon the request of a contributory or creditor. The respondent submits that such a request was made, and a vote was held among the creditors and contributories of FOSB. However, the majority of creditors and contributories opposed its formation. In accordance with r. 119 of the Companies (Winding-Up) Rules 1972, a resolution is deemed passed when a majority in both number and value vote in favour of the decision. In this case, the decision against the formation of a COI was validly made and is binding.

[45] The applicant has provided no evidence to challenge the validity of the voting process or to demonstrate that the rejection of the COI was unreasonable. Furthermore, in *AA Sawit Sdn Bhd v. Stable-Win Sdn Bhd* [2014] CLJU 667; [2014] 1 LNS 667; [2014] AMEJ 0766; [2014] MLRHU 222, it was reinforced that a liquidator is vested with discretion in summoning meetings to consider the appointment of a COI, which is not a mandatory requirement unless explicitly requested and approved by creditors or contributories. Justice Gunalan Muniandy held this in *AA Sawit Sdn Bhd* (*supra*):

> [18] For instance, it was alleged that he had failed to call for a meeting of creditors and contributories and had also failed to constitute a committee of inspection. *A plain reading of s. 241(1), which is the governing provision on this issue, by the use of the word 'may', shows that the Liquidator is vested with a discretion whether to summon separate meetings of the creditors and contributories to ascertain if the creditors and contributories require the formation of a committee of inspection. There is no mandatory requirement to summon separate meetings unless requested by any creditor or contributory*. As there was no evidence on record in the instant case that any creditor or contributory had requested any such meeting to be summoned, the allegation of breach of s. 241(1), CA by the Liquidator was unfounded and misconceived.
>
> (emphasis added)

[46] The court further finds that the liquidation of FOSB is a solvent winding-up with only three creditors and five contributories. As established in *Lim Boon Chuan v. Wonderful Castle Sdn Bhd (In liquidation) & Anor* [2019] 1 CLJ 65; [2018] 6 MLRA 372, a COI is typically necessary in cases

involving a large number of creditors, making it impractical for all to participate in liquidation proceedings. Given the small number of stakeholders in this case, forming a COI would serve no practical purpose.

[47] The court also takes into account that the applicant's primary reason for seeking the formation of a COI relates to allegations of improprieties in the allotment and transfer of shares in FOSB. However, these allegations have already been litigated and do not constitute valid grounds to revisit the issue through a COI. The applicant failed to provide any new evidence to justify re-examining these claims.

[48] The respondent has provided the applicant access to FOSB's books and records, ensuring transparency in the liquidation process. There is no evidence to suggest that the liquidator has refused, neglected, or failed to fulfil his statutory obligations under the Companies Act 2016.

[49] Given these findings, the court concludes that the applicant has not established a valid basis for leave to commence proceedings against the liquidator of FOSB.

Issue 4: Does The Applicant Have Standing To Demand Directorship Changes In Puspa Sepakat Sdn Bhd (PSSB)?

[50] The court finds that the applicant has failed to establish any legal or factual basis to compel the liquidator of FOSB to remove a director of PSSB and appoint the applicant in their place. Section 206(3) of the Companies Act 2016, which the applicant relies on, merely prescribes the procedural requirement of issuing a special notice and passing a resolution for the removal or appointment of a director. It does not, in any way, grant the liquidator unilateral authority to effect such changes in PSSB's board of directors. The applicant has not provided any justification for why his appointment to PSSB is necessary to safeguard FOSB from pecuniary losses, an essential criterion for obtaining leave to initiate legal proceedings against the liquidator. In the absence of any legal duty on the liquidator to act in the manner sought and given the lack of evidence of financial harm to FOSB, the court finds no merit in the applicant's request.

[51] The claim that FOSB, as the largest shareholder in PSSB, holds the right to dictate director appointments is incorrect. FOSB holds an equal number of shares as another company, Z.K.S Serangkai Sdn Bhd, and does not have a controlling interest. Courts, including in *Chan Thiam Teng v. Ban Swee Heng Sdn Bhd* [1992] CLJU 37; [1992] 1 LNS 37; [1992] 2 MLJ 583; [1992] 4 MLRH 277, have consistently ruled that shareholders must follow proper legal channels rather than demand unilateral changes. The court in *Chan Thiam Teng* (*supra*) said:

> A resolution properly passed, which is so in this case, is binding on the defendants and until it is dissolved, cancelled or annulled, expressly or by implication, it bound the defendants on actions taken by its director who acted within the ambit of the resolution.

[52] As there is no *prima facie* evidence of mismanagement or financial harm to FOSB, the court dismisses the applicant's request, reaffirming that the liquidator has no obligation to interfere in PSSB's directorial affairs.

Court's Discretion in Granting Leave

[53] The decision to grant leave is ultimately at the discretion of the court, which must assess the merits of the case based on available evidence. Courts have repeatedly emphasised the need for judicial caution in granting leave to prevent the liquidation process from being derailed by unnecessary litigation.

[54] In *Sarawak Timber Industry Development Corp v. Borneo Pulp Plantation Sdn Bhd* [2004] 8 CLJ 584; [2005] 2 MLJ 74; [2004] AMEJ 0097; [2004] 2 MLRH 749, the court stated:

> there must be more than a mere allegation to move the court into granting leave to bring an action against a liquidator. An applicant who takes out misfeasance proceedings against a liquidator must show that he has sufficient interest in the outcome of the application.

In other words, courts should be reluctant to interfere with a liquidator's decisions unless there is clear evidence of bad faith or misconduct. The role of the court is to ensure that liquidation is conducted in a fair and orderly manner, not to entertain speculative claims.

[55] Liquidators are officers of the court and are entitled to judicial protection when carrying out their duties. Courts have recognised that permitting unfounded lawsuits against liquidators could lead to delays in winding-up proceedings and increased costs, ultimately prejudicing creditors and contributories.

[56] This court is bound by the doctrine of *stare decisis*, which ensures consistency and certainty in judicial decisions. The Federal Court in *N Chanthiran Nagappan* (*supra*) emphasises that adherence to binding precedent is mandatory. The requirement of obtaining leave before initiating proceedings against a liquidator is a long-established legal principle, and this court must apply it accordingly.

Conclusion

[57] The liquidator's conduct in the management of the company has been consistent with statutory requirements. The applicant has failed to provide credible evidence of bad faith, misconduct, or pecuniary loss to the company. Accordingly, the applicant's application is dismissed, and costs of RM2,000 awarded to the respondent. This judgment reinforces the importance of protecting the integrity of the liquidation process and ensuring that liquidators can discharge their duties without undue interference.